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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

STATE OF MARYLAND,
Petitioner,

v.

SANDRA ANN CRAIG,
Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

~~MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND~~ **BRIEF FOR AMICUS CURIAE AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF NEITHER PARTY**

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Psychological Association (APA), hereby respectfully moves for leave to file the attached brief *amicus curiae*. The attorney for respondent has consented; the attorney for petitioner has not responded to APA's request for consent.

The American Psychological Association ("APA") is a voluntary, nonprofit, scientific, and professional organization with more than 75,000 members. It has been the major association of psychologists in the United States since 1892, and includes the vast majority of psychologists holding doctoral degrees from accredited universities in this country. Among APA's major functions are promoting psychological research, improving research methods,

and promulgating information regarding human psychological behavior.

A significant proportion of APA membership provides direct clinical services to children and their families. Many other members have made important contributions to the developing scientific and clinical literature on the incidence, prevalence, epidemiology, psychological effects, and treatment of victims of childhood sexual abuse. Members of APA have also studied and published research on the abilities of children as witnesses, the emotional states of children who testify, and the credibility of children's testimony to jurors, as well as numerous aspects of procedural justice. Other members have been engaged in the diagnosis and treatment of sex offenders.

The APA has participated as *amicus* in many cases in this Court involving mental health and social science issues. APA contributes *amicus* briefs only where it has special knowledge to share with the Court. For example, APA submitted a brief in *Kentucky v. Stincer*, 482 U.S. 730 (1987), and this Court expressly relied upon the central submission in that brief:

> "Where a competency hearing bears a substantial relationship to the defendant's opportunity to defend, a court must then balance the defendant's role in assisting his defense against the risk of identifiable and substantial injury to the specific child witness. See Brief for American Psychological Association as Amicus Curiae 15-26 (noting that intuitive view that child victims of sexual abuse are particularly vulnerable in legal proceedings may not be correct for all children)."

482 U.S. at 747, n.20.

As in *Stincer*, APA regards this as a case in which it can make a significant contribution to the Court's consideration of the issues before it. APA wishes to inform the Court of the state of current social science data (studies and clinical experience) regarding the emotional distress experienced by sexually abused children in the legal system generally; the distress suffered specifically by children required to give testimony in face-to-face confrontation with a defendant; and the impact of such distress on child witnesses' ability to testify truthfully and accurately.

APA has significantly more to contribute now than it did in *Stincer*, because the data generated by psychological research has developed substantially since APA submitted its *Stincer* brief in January 1987. These data should assist the Court in weighing the degree to which this case implicates the state interests in 1) protecting child witnesses from severe emotional distress and 2) obtaining the most complete and truthful possible testimony from child witnesses in sexual abuse cases. The data therefore bear on the question whether and under what circumstances the Court should recognize an exception in this context to the defendant's constitutional right to meet face-to-face with those who give evidence at trial.

APA believes no other *amicus*, and certainly neither party, is in a position to provide the Court with this important information.

For the foregoing reasons, APA respectfully urges the Court to accept and file the enclosed brief *amicus curiae*.

Respectfully submitted,

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BRIEF FOR AMICUS CURIAE AMERICAN PSYCHOLOGICAL ASSOCIATION IN SUPPORT OF NEITHER PARTY

INTEREST OF AMICUS CURIAE

The interest of APA is described in the accompanying Motion for Leave to File Brief *Amicus Curiae*.[1]

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[1] Members of APA with expertise in the relevant area of scientific inquiry invariably play a leading role in drafting APA's *amicus* briefs. In this case, counsel gratefully acknowledges the substantial assistance of Murray Levine, Ph.D., J.D., Gail S. Goodman, Ph.D., and Gary B. Melton, Ph.D., and the assistance of Michael Saks, Ph.D., and nonmember Josephine Bulkley, J.D., in the preparation of this brief. A number of other scholars in APA, the American Psychology—Law Society, and the Consortium on Children, Families and the Law, reviewed and commented on the brief. Counsel also thanks Cathleen Anne Carter, Corrine M. Lindquist, Joseph R. Mills, Elizabeth L. Quarles, David Allan Steinweg, and Teri Ann Vigars for research assistance.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Coy v. Iowa*, 108 S. Ct. 2798, 2803 (1988), this Court did not decide whether a criminal defendant's Sixth Amendment right to a literal face-to-face confrontation with prosecution witnesses admits of exceptions to protect compelling state interests. The Court also did not decide whether, if so, protecting child victim-witnesses from emotional distress constitutes such an interest. This case presents these questions. APA submits that the right of face-to-face confrontation should give way in a case where a child victim-witness would likely suffer serious emotional distress from such a confrontation.

Reports of child abuse in this country have increased in recent years.[2] With this increase have come concerns that the legal system is often insensitive to child witnesses.[3] Psychologists have turned their attention to the study of the capabilities of children to testify, jurors' reactions to child witnesses, and the emotional effects of involvement in the legal process on child witnesses.

The resulting body of research supports the proposition that children as a class may be especially likely to be emotionally distressed by courtroom confrontation with

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[2] When the National Center on Child Abuse and Neglect began collecting data in 1976, child protection agencies nationwide reported 1,975 cases of child sexual abuse. By 1982, this figure had grown to 56,607. Reports have continued to increase: in 1985, the figure reached 127,000, and in 1986 (the latest year for which statistics are available), it reached 132,000. AM. ASS'N FOR PROTECTING CHILDREN, HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING 1986 (1988); AM. ASS'N FOR PROTECTING CHILDREN, HIGHLIGHTS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING 1985 (1987).

[3] *See Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (plurality opinion); CHILD SEXUAL ABUSE AND THE LAW (J. Bulkley, Ed., 1983); D. WHITCOMB, E. SHAPIRO, & L. STELLWAGEN, WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS (1985) (hereinafter cited as "WHITCOMB, *supra* n.3").

their alleged abusers.[4] While this may argue for permitting the use of protective measures in many cases, there is also evidence that a substantial number of children are capable of testifying fully and accurately under conventional criminal procedures without serious and lasting harm. Moreover, although there is some basis for determining which children are most in need of such protection, knowledge remains sparse about which procedures are most likely to ameliorate harm. Therefore, intrusions on defendants' rights under the Confrontation Clause should be applied only on a case-specific basis, where necessary to protect individual child victim-witnesses. Point I.

Psychological research, clinical observation, and theory undercuts the rule of the Maryland Court of Appeals that a court must in every case require child victim-witnesses to take the stand and observe their degree of distress before forming a judgment whether protective measures are needed. Evidence other than observing the child actually suffer the injury, including expert testimony based upon psychological theory and research, can in many cases provide a sufficient basis for the determination without forcing the child to undergo the very harm the State wishes to avert before protection may be invoked. Point II.

Research also demonstrates that testifying in confrontation with the alleged abuser may in many cases cause child victim-witnesses to refuse to testify or to testify less completely than they are capable. Research further shows that jurors tend unduly to consider the comprehensiveness of children's testimony in evaluating their truthfulness. Requiring child witnesses to undergo face-to-face confrontation, therefore, may in some cases

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[4] In this regard, the evidence is much stronger than it was in January 1987, when APA submitted its *amicus* brief in *Kentucky v. Stincer*, 482 U.S. 730 (1987).

actually disserve the truth-seeking rationale that underlies the Confrontation Clause. Point III.

For these reasons, APA urges the Court to retain the case-by-case approach to Confrontation Clause exceptions suggested by the Court's opinion in *Kentucky v. Stincer*, 482 U.S. 730, 746, n.20 (1987). In those cases in which a compelling justification may exist to limit the scope of confrontation, APA submits that the procedures prescribed by the Court of Appeals frustrate the very purpose of protection. Courts should be flexible in accepting evidence from multiple sources of information, including experts, rather than insisting upon procedures likely to exacerbate the distress of already vulnerable child victim-witnesses.

I. SEXUALLY ABUSED CHILDREN FREQUENTLY SUFFER SERIOUS EMOTIONAL TRAUMA AND MAY BE PARTICULARLY VULNERABLE TO FURTHER DISTRESS THROUGH THE LEGAL PROCESS.

In *Coy v. Iowa*, 108 S. Ct. 2798 (1988), this Court held that the right of a defendant to confront prosecution witnesses face-to-face is a central aspect of the Confrontation Clause. *Id.* at 2803. The Court left to another day the question whether that right must give way, in appropriate circumstances, to a sufficiently compelling state interest, and specifically reserved the question whether protection of a child victim-witness in a sexual abuse case might give rise to such an exception. *Id.* Four members of this Court, however, reached these questions and answered them in the affirmative. *Id.* at 2805 (O'Connor, J., concurring) ("I would permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to further an important public policy. . . . The protection of child witnesses is . . . just such a policy."); *id.* at 2809 (Blackmun, J., dissenting) ("[A] State properly may consider the protection of child witnesses to be an important public policy [that] outweighs the narrow Confrontation Clause right at issue . . . .").

It is important to recognize that the area of compelling state concern is broader than the State's interest in obtaining complete and truthful testimony. As discussed in Point III, *infra*, it is true that protective measures may be necessary in many cases to ensure that a child victim will be able to tell "the whole truth and nothing but the truth." But in addition to this truth-seeking interest the State has a straightforward and compelling interest in protecting children from severe emotional distress imposed by the legal system without regard to the impact of such distress on the child's ability to tell the truth. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) (State has a "compelling" interest in "safeguarding the physical and psychological well-being of . . . minor[s]"); *Coy*, 108 S. Ct. at 2805 (O'Connor, J., concurring); *id.* at 2809 (Blackmun, J., dissenting). The psychological data suggests that both the State's interest in discovering the truth about sexual abuse and its interest in shielding minors from emotional distress imposed or exacerbated by the legal system may be threatened by strict adherence in a given case to a criminal defendant's right to "face" his or her accuser.

A. Child Victims Suffer Emotional Distress as a Result of their Victimization.

A recent review of studies of child victims of sexual abuse showed that a significant proportion of victims suffer moderate to severe emotional distress after the episode is disclosed.[5] The symptoms may include sleep

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[5] Browne & Finkelhor, Impact of Child Sexual Abuse: A Review of the Research, 99 PSYCHOLOGICAL BULL. 66 (1986); Conte & Berliner, The Impact of Sexual Abuse on Children: Empirical Findings, in HANDBOOK ON SEXUAL ABUSE OF CHILDREN: ASSESSMENT AND TREATMENT ISSUES (L. Walker ed. 1988).

and eating disturbances, fears and phobias, depression, guilt, shame and anger, school problems and running away. As many as a quarter of sexually abused children may also show inappropriate sexual behavior. The symptoms vary depending on the age and sex of the child.[6] Many victims are believed to suffer from Post-Traumatic Stress Disorder.[7]

For a subgroup of child victims, the effects of sexual abuse are particularly significant and persistent. Although a substantial proportion of those who recall having been sexually abused in childhood adapt well as adults, adults who report such experiences are more likely than others to have significant mental health problems: [8]

> "Empirical studies with adults confirm many of the long-term effects of sexual abuse mentioned in the clinical literature. Adult women victimized as children are more likely to manifest depression, self-destructive behavior, anxiety, feelings of isolation and stigma, poor self-esteem, a tendency toward revictimization, and substance abuse. Difficulty in trusting others and sexual maladjustment in such areas as sexual dysphoria, sexual dysfunction, impaired self-esteem, and avoidance of or an abstention from sexual activities have also been reported by empirical researchers, although agreement between studies is less consistent for the variables on sexual functioning." [9]

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[6] Browne & Finkelhor, *supra* n.5, at 99; J. HAUGAARD & N. REPPUCCI, THE SEXUAL ABUSE OF CHILDREN (1988); C. WALKER, B. BONNER, & K. KAUFMAN, THE PHYSICALLY AND SEXUALLY ABUSED CHILD: EVALUATION AND TREATMENT 112-114 (1988).

[7] Wolfe, Gentile & Wolfe, The Impact of Sexual Abuse on Children: A PTSD Formulation, 20 BEHAVIOR THERAPY 215 (1989).

[8] Briere & Runtz, Post Sexual Abuse Trauma, in LASTING EFFECTS OF CHILD SEXUAL ABUSE 85, 89 (G. Wyatt & G. Powell eds. 1988).

[9] Browne & Finkelhor, *supra* n.5, at 72.

Empirical research indicates that the typical adult who was abused in childhood has more difficulties in these areas, on average, than other adults.

B. Child Victims May Be More Likely Than Adult Victims to Suffer Substantial Distress as a Result of Testifying in the Physical Presence of the Defendant.

Testifying in court may be anxiety provoking for any witness. Certainly adult victims of sexual attack are known to have suffered stress and humiliation when forced to recount details of embarrassing events in court, submit to hostile cross-examination, and face the alleged offender.[10] As court dates approach, fear of testifying is one of adult rape victims' strongest fears.[11]

Yet children may be in an even more vulnerable position than adults. The period during which child sexual assault victims are involved in legal proceedings represents a time of special stress for them.[12] Stressors in childhood can slow the course of normal cognitive and emotional development such that stressed children do not advance at the same pace as their unstressed peers.

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[10] *See generally* S. Brownmiller, AGAINST OUR WILL: MEN, WOMEN, AND RAPE (1975).

[11] Calhoun, Atkeson, & Resnick, A Longitudinal Examination of Fear Reactions in Victims of Rape, 29 J. COUNSELING PSYCHOLOGY 655, 659 (1982).

[12] Goodman, Jones, Pyle, Prado, Port, England, Mason, & Rudy, The Child in Court: A Preliminary Report on the Emotional Effects of Criminal Court Testimony on Child Sexual Assault Victims, in THE CHILD WITNESS: DO THE COURTS ABUSE CHILDREN? (G. Davies & J. Drinkwater eds. 1988); G. Goodman, The Emotional Effects on Child Sexual Assault Victims of Testifying in Criminal Court, Final Report to the National Institute of Justice, U.S. Dept. of Justice (1989) (reporting complete findings of same study) (hereinafter cited as "Goodman, *supra* n.12") (available upon request from counsel); Runyan, Everson, Edelsohn, Hunter, & Coulter, Impact of Legal Intervention on Sexually Abused Children, 113 J. PEDIATRICS 647 (1988).

Temporary developmental regressions may even appear. Although adults too may suffer distress from legal involvement, their development is more complete. Thus, the negative impact of legal involvement may be more significant for child than adult victims.

In addition, young children's lack of cognitive sophistication may make the legal system even more difficult to understand than it is for adult victims. By the intermediate (late elementary) grades, most children have an appreciation of the nature and purpose of the adversary system and an understanding of many legal concepts.[13] However, preschool and primary grade children often comprehend no more than the most rudimentary legal concepts (*i.e.*, police and judge), if any. Moreover, children involved in sexual abuse cases are even less knowledgeable, on average, than their peers. Given the fact that ambiguity generally fosters anxiety,[14] young children's lack of understanding of the legal process[15] is likely to add to the stress that they experience when they testify.

The stress of appearing in court and testifying in the presence of a defendant is added to the distress that many

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[13] Melton, Preparing Sexually Abused Children for Testimony: Children's Perceptions of the Legal Process, Reports to the National Center on Child Abuse and Neglect Pursuant to Grant No. 90-CA-1274 (available from counsel upon request).

[14] Dibner, Ambiguity and Anxiety, 56 J. ABNORMAL & SOC. PSYCHOLOGY 165 (1954).

[15] *See* Flin, Stevenson, & Davies, Children's Knowledge of Court Proceedings, 80 BRITISH J. PSYCHOLOGY 285 (1989); Melton, *supra* n.13; Saywitz, Children's Conception of the Legal System: "Court is a Place to Play Basketball," in PERSPECTIVES ON CHILDREN'S TESTIMONY 131 (S. Ceci, M. Toglia, & D. Ross, eds. 1989); Warren-Leubecker, Tate, Hinton, & Ozbek, What Do Children Know About the Legal System and When Do They Know It? First Steps Down a Less Traveled Path in Child Witness Research, in PERSPECTIVES ON CHILDREN'S TESTIMONY 158 (S. Ceci, M. Toglia, & D. Ross, eds. 1989).

child victim-witnesses are already experiencing due to the trauma of the sexual abuse. A number of studies, some completed subsequent to this Court's decision in *Coy*, have examined children's reactions to legal involvement and courtroom testimony. Although testimony in *juvenile* court does not appear to result in significant, lasting distress for most children,[16] testimony in *criminal* court is, on average, associated with immediate as well as lasting distress.[17]

When the emotional well-being of children who testified in criminal court is compared to that of a matched group of children who were also involved as alleged victims in child sexual assault prosecutions but who did not have to testify, children who testified evidenced significantly greater distress 7-months post-testimony as well as after the final disposition of their cases.[18] The testifying children's distress was mainly manifested in greater depression, anxiety, and psychosomatic symptoms.

There is reason to believe face-to-face confrontation is a significant factor in child victim-witnesses' distress. Indeed, research shows that the most frequent fear ex-

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[16] Runyan, *supra* n.12.

[17] Goodman, *supra* n.12. The Goodman study was conducted through observation of criminal trials in three Colorado counties and interviews of child witnesses and their parents. Care must be taken, of course, in generalizing from this study to courts in other jurisdictions that apply other procedures. *See also* V. DEFRANCIS, PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS (1969) (survey of parents in Brooklyn and the Bronx about their children's response to the process in sexual abuse cases); Tedesco & Schnell, Children's Reactions to Sex Abuse Investigation and Litigation, 11 CHILD ABUSE AND NEGLECT 267 (1987) (survey of children in Iowa about their experiences in criminal courts).

[18] Goodman, *supra* n.12.

pressed by children awaiting testimony is a fear of facing the defendant.[19] When children are interviewed while waiting to testify or after they emerged from the courtroom, most children regardless of age mention facing the defendant as the most negative and frightening issue.[20] When asked how the legal process could have been made less stressful, children and parents most often mention use of closed-circuit television or videotaped testimony.[21]

Not all children are adversely affected, however, and some professionals believe that, if handled supportively, some children may benefit from the experience of testifying against their abusers.[22] This fact counsels against wholesale abrogation of the defendant's right to face-to-face confrontation, and in favor of careful case-by-case analysis of the likely impact on the child.[23] *See Ken-*

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[19] *Id.* Authorities have long believed that a significant amount of trauma and upset experienced by the child witness is due to the presence and proximity of the accused. Berliner and Barbieri, The Testimony of the Child Victim of Sexual Assault, 40 J. Soc. Issues 125 (1984); Parker, The Rights of Child Witnesses: Is the Court a Protector or Perpetrator? 17 New England L. Rev. 643 (1982); Whitcomb, *supra* n.3, at 17-18.

[20] Goodman, *supra* n.12; *see also* R. Flin, G. Davies & A. Tarrant, The Child Witness (1988) (similar findings for children in the United Kingdom).

[21] Goodman, *supra* n.12.

[22] Melton, Sexually Abused Children and the Legal System: Some Policy Recommendations, 12 Am. J. Family Therapy 61, 64-65 (1985) (summary of testimony on behalf of APA given before Senate Subcommittee on Juvenile Justice); Berliner & Barbieri, *supra* n.19.

[23] Goodman's work indicates that the experience of testifying sometimes is related to the child's general psychological well-being over an extended period of time. The fact that a child is anxious about testifying, however—even testifying face-to-face with the defendant—does not necessarily mean that the child will be harmed

tucky v. Stincer, 482 U.S. at 746, n.20 ("a court must . . . balance the defendant's role in assisting in his defense against the risk of identifiable and substantial injury to the specific child witness") (citing APA *amicus* brief).

Nevertheless, children who must testify more than once, children who lack maternal support when the abuse was disclosed, children whose cases lack corroborative evidence (so that proof of the crime rests primarily on the child's testimony), children whose abuse was severe, and children who were particularly frightened of the defendant when they testified, are most likely to show adverse effects of testifying.[24] Children who are more closely related to the defendant are also somewhat more distressed as a result of testifying than children who are less closely related to the defendant. Children with any

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by the experience. A substantial body of research involving adults shows that satisfaction with the legal process is highly related to the actual fairness of procedures, independent of the anxiety that participants experience. *See generally* E. Lind & T. Tyler, The Social Psychology of Procedural Justice (1988); Thibaut & Walker, A Theory of Procedure, 66 Cal. L. Rev. 541 (1978). Psychological research and theory on the significance of control—having a say—is also important to children in their evaluation of the legal process. Melton & Limber, Psychologists' Involvement in Cases of Child Maltreatment: Limits of Role and Expertise, 44 Am. Psychologist 1225, 1226-1227 (1989). By the middle elementary grades, most children understand the fairness of both sides having a say in legal disputes. Melton, *supra* n.13. Moreover, although children who are relatively knowledgeable about the legal process are especially likely to perceive victim-witnesses as more likely to be anxious, they also are especially likely to perceive the process as fair. *Id.*

[24] These propositions and the propositions contained in the balance of this paragraph are supported in Goodman, *supra* n.12. Clearly, some of these factors affecting children's response to testimony are not directly related to the procedures pursuant to which they testify. Nevertheless, fear of the defendant is a particularly important factor, and that factor is directly related to concerns about confrontation.

of these characteristics are likely to be at particular risk of enduring emotional distress. These are factors which may be evaluated on an individual basis to determine the necessity of protecting a child witness by using procedures that limit a defendant's right to a literal face-to-face confrontation with prosecution witnesses.[25]

One of the strongest predictors of distress—having to testify many times—is particularly relevant to the Maryland Court of Appeals' decision. The Court appeared to promulgate a rule requiring the child first to testify in front of the defendant, to establish the child's emotional distress and inability to testify, and then again on closed-circuit television if the face-to-face confrontation in fact proved traumatic. Following that Court's prescribed procedure would clearly cause a greater number of children to testify multiple times, thereby exacerbating these children's distress.[26] Also, recent research findings suggest that requiring children who are particularly frightened of the defendant to testify face-to-face to "test" whether closed-circuit televi-

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[25] Age is another factor that may be relevant. Developmental research shows that young children are especially likely to require special support in order to cope with stress. Maccoby, Social-Emotional Development and Response to Stressors, in STRESS, COPING AND DEVELOPMENT IN CHILDREN 219 (N. Garmezy & M. Rutter eds. 1988). Sometimes, however, young children are so uncomprehending that they are relatively unaffected by stressors that are powerful for older children and adults. *Id.* In that regard, the more children know about the legal system, the more they are likely to perceive witnesses as experiencing anxiety. Melton, *supra* n.13. Consequently, age alone cannot be used to determine the level of support that child witnesses require. Nevertheless, when young children do perceive the courtroom situation to be stressful (probably most situations in which the child is competent to testify), they will require extraordinary support to avoid substantial distress.

[26] Repeated interviewing of children about sex crimes in general has also been linked to greater distress in children. Tedesco & Schnell, *supra* n.17.

sion is necessary will result in increased distress in child victims.[27]

In sum, the high rate of moderate and severe emotional distress among potential child sexual abuse victim-witnesses does not justify an irrebuttable presumption that the child will suffer severe emotional distress as a consequence of testifying while confronting the defendant face-to-face. Because a great many of the potential child witnesses are indeed highly vulnerable, however, it is imperative that the court make particularized inquiries to determine the need for protective measures in each case.

II. PSYCHOLOGICAL THEORY AND DATA ABOUT THE DYNAMICS OF SEXUAL ABUSE VICTIMS' EMOTIONAL DISTRESS MAKE POSSIBLE INDIVIDUALIZED DETERMINATIONS ABOUT THE NEED FOR PROTECTIVE MEASURES WITHOUT REQUIRING VULNERABLE CHILDREN TO DIRECTLY CONFRONT THEIR ALLEGED ABUSERS IN EVERY CASE.

As noted in Point I, recent research findings strongly suggest that testifying face-to-face with the alleged abuser significantly increases the distress experienced by child victim-witnesses. As noted in Point III, *infra*, this distress has been shown in many cases adversely to impact the child's ability to testify completely and accurately about the alleged abuse, and may also distort the

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[27] *See* Goodman, *supra* n.12. Facing a fearful child with a feared person is similar to a technique called "flooding" used in behavior therapy. Flooding may lead to abreaction (strong reexperiencing of fearful past experiences). "Some abreactions are followed by therapeutic changes, while others are not and may leave the patient worse off than he was before. . . . The one apparent essential, to give it a chance of being beneficial, is for it to take place in a protected setting such as the psychotherapeutic relationship." If the stimulation is too strong, "the subject may 'switch off' or withdraw entirely." J. WOLPE, THE PRACTICE OF BEHAVIOR THERAPY 236-237, 246 (1982).

jury's evaluation of the truthfulness of the testimony. This interference with the truth-seeking process may justify protective measures in many cases. *Cf. Ohio v. Roberts*, 448 U.S. 56, 64 (1980) (characterizing state's interest as one in "effective law enforcement, and . . . rules of evidence applicable in criminal proceedings"). Moreover, as noted in Point I, the data also strongly support the proposition that many children are seriously distressed by testifying face-to-face with their alleged abuser, and that the distress may be enduring. Avoidance of imposing emotional harm on the child victim-witness serves a compelling state interest independent of the truth-seeking goal of the criminal process.

Although research data concerning the factors that predict high stress and/or lasting distress for child victim-witnesses is still being developed,[28] clinical data and psychological theory provide a framework from which conclusions about this question may be drawn. The clinical and research data on child sexual abuse show that the overwhelming majority of children who are sexually abused are victimized by someone they know. The alleged perpetrator may be a parent, but more often a step-parent, a sibling, or another relative (*e.g.* uncle or cousin), or a person in an authority relationship to the child such as a baby-sitter, a child-care worker, a teacher, or a minister. "Overall, then, the stereotype of children being molested mainly by strangers is not accurate."[29] Greater trauma has been reported consistently when the abuser is a father or father figure, compared to all other perpetrators.[30]

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[28] Given ethical and practical constraints, systematic field research is extremely difficult to conduct in this area.

[29] J. HAUGAARD & N. REPPUCCI, *supra* n.6, at 47-48; Everson, Hunter, Runyon, Edelsohn, & Coulter, Maternal Support Following Disclosure of Incest, 59 AM. J. ORTHOPSYCHIATRY 197 (1989).

[30] Browne & Finkelhor, *supra* n.5.

Two well-known scholars on child abuse have postulated a theoretical model of what they call the 'traumagenic dynamics" of child sexual abuse.[31] Largely based on clinical experience and publications, and to a lesser degree on systematic research, this theoretical model is subject to further test. The model reflects the best judgment of two recognized experts about issues in child sex abuse cases, and provides a framework for analyzing the emotional consequences of a possible face-to-face encounter between the child victim-witness and a defendant known to the child.

Finkelhor and Browne identify four relevant factors: "traumatic sexualization," "betrayal," "powerlessness" and "stigmatization." Traumatic sexualization refers to a process of shaping a child's sexuality in developmentally inappropriate ways. Most sexual abuse, particularly when the alleged perpetrator is known to the child, does not involve force. Usually, a child is *rewarded* for sexual behavior by the perpetrator. "It occurs through the exchange of affection, attention, privileges, and gifts for sexual behavior." When force is employed, however, "a form of traumatic sexualization may occur as a result of the fear that becomes associated with sex in the wake of such an experience."[32] The fear, when present, may be rearoused in the presence of the defendant.

The complex experience aroused when kindness and affection are used as inducements to the child to submit to sexual activities introduces its own difficulties when the child confronts the defendant after being told that such encounters were wrong. Betrayal occurs when "children discover that someone on whom they were vitally dependent has caused them harm."[33] The strong

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[31] Finkelhor & Browne, The Traumatic Impact of Child Sexual Abuse, A Conceptualization, 55 AM. J. ORTHOPSYCHIATRY 530 (1985).

[32] *Id.* at 531.

[33] *Id.* at 531.

emotion of betrayal may be rekindled when the vulnerable child confronts a formerly trusted defendant.

The third factor is termed powerlessness. The "child's will, desires, and sense of efficacy are continually contravened [by the abuse]. . . . This is exacerbated by whatever coercion and manipulation the offender may impose as part of the abuse process." [34] When confronted by the defendant, the child may reexperience the sense of helplessness or powerlessness. The child may continue to fear the defendant's ability to harm the child, despite reassurance to the contrary.

The fourth factor is "stigmatization," which "refers to the negative connotations—*e.g.*, badness, shame, and guilt—that are communicated to the child around the experiences and then become incorporated into the child's self-image." [35] The child may be reluctant to reveal details of sexual abuse due to a sense of shame and guilt. "Pressure for secrecy from the offender can also convey powerful messages of shame and guilt." [36] As discussed in more detail in Point III, *infra*, confrontation may arouse these complex and powerful emotions and interfere with the child victim-witness' ability to communicate reasonably.[37]

A trial court need not subject a vulnerable child to the ordeal of testifying before the defendant to test whether such confrontation is likely to harm the child witness or impair the child's ability to testify.[38] Scien-

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[34] *Id.* at 532.

[35] *Id.* at 532-533.

[36] *Id.* at 533; *see also* Berliner & Barbieri, *supra* n.19.

[37] *See also* Burgess & Holmstrom, Rape: The Victim and the Criminal Justice System, in 3 VICTIMOLOGY: A NEW FOCUS 31-48 (1975); Rogers, Child Sexual Abuse and the Courts: Preliminary Findings, in SOCIAL WORK AND CHILD SEXUAL ABUSE 145-153 (J. Conte & D. Shore eds. 1982).

[38] The Maryland Court of Appeals' requirement that the court should attempt to elicit testimony from a child in a face-to-face con-

tific knowledge of the foregoing processes provides a basis for making an individualized determination of necessity to limit the defendant's Sixth Amendment confrontation rights in order to protect the child victim-witness, and—as discussed in Point III, *infra*—to meet another important state interest, namely to give the court the benefit of the child's best testimony. The presence and the influence of such factors may be developed by expert testimony based on a clinical therapist's experiences with a traumatized child. The trial court may receive guidance from such expert witnesses, bolstered where appropriate with testimony from parents, teachers, other confidants, or persons who have an opportunity to observe the child, sufficient to make an informed and fair decision that balances the State's interest in protecting a vulnerable child victim-witness and the truth-seeking process against the defendant's right to confrontation.[39]

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frontation before authorizing the one-way video procedure may be self-defeating. If the child is experiencing strong negative emotions in the presence of the defendant and is removed from the defendant's presence when the child does not answer questions, then the response of not testifying has been reinforced. The probability of not testifying in response to questions that provoke anxiety may therefore be increased. B. SKINNER, SCIENCE AND HUMAN BEHAVIOR 184-186 (1953); F. KELLER & W. SCHOENFELD, PRINCIPLES OF PSYCHOLOGY 61-62 (1950); A. GRAZIANO, CHILD WITHOUT TOMORROW 85-102 (1974); A. KAZDIN, BEHAVIOR MODIFICATION IN APPLIED SETTINGS 62-64 (1980).

[39] The New York Court of Appeals, upholding the constitutionality of New York's law authorizing two-way closed circuit testimony by a child declared vulnerable, noted approvingly that a variety of sources of evidence in addition to expert testimony might help to establish the "extraordinary circumstances" necessary to authorize two-way videotaped testimony. *People v. Cintron*, 1990 W.L. 1337 (N.Y.). *See also People v. Algarin*, 129 Misc. 2d 1016 (N.Y. Supp. 1987) (testimony of child victim's mother and statements of the prosecutor concerning child's out-of-court behavior; additionally child victim expressed "terror" of defendant, left the courtroom crying hysterically and hysteria continued for a time thereafter); *State*

III. IF A VULNERABLE CHILD VICTIM-WITNESS IS REQUIRED TO TESTIFY UNDER CONDITIONS OF HIGH EMOTIONAL AROUSAL, THE CONFRONTATION CLAUSE INTEREST OF PROVIDING RELIABLE TESTIMONY WILL NOT BE SERVED.

As the Court recognized in *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987), and as Justice O'Connor noted in her concurring opinion in *Coy*, 108 S. Ct. at 2804, there are often no witnesses to the crime of sex abuse except the perpetrator and the victim. The child victim-witnesses' testimony is therefore crucial if the State is to convict a guilty person; truthful testimony is obviously also essential to an innocent defendant seeking a verdict of not guilty.

The premise of the Confrontation Clause is that it is more difficult for a witness to lie, and more likely that the trier of fact will be able to detect lying from the witness' demeanor, if the witness must accuse the defendant to his face. *Coy*, 108 S. Ct. at 2800-2802. This premise may have limits, however, when applied to child witnesses.

A. The Completeness of Children's Testimony is Influenced by Conditions of Emotional Arousal.

A child victim-witness testifying under conditions of heightened emotional arousal is most likely to refuse to testify, to be unable to verbalize answers to questions, or

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v. Tafova, 765 P.2d 1183 (N.M. App. 1988), *cert. denied*, 109 S.Ct. 1572 (1989) (full day of uncontroverted expert testimony of child's trauma); *Glendening v. State*, 536 So. 2d 212 (Fla. 1988), *cert. denied*, 109 S.Ct. 3219 (1989) (testimony of child's mother, the child's guardian *ad litem*, the social worker who was trained in dealing with sexually abused children, and the child's pediatrician).

New York Criminal Procedure Law § 65.20.9 (a-1) specifies twelve factors to be considered in making this judgment. These factors may be evaluated in a hearing and may be used to establish that a vulnerable child victim-witness may require the protection of closed-circuit television to allow the child to testify without imposing undue further distress on the child.

to be tearful.[40] Moreover, the presence of the defendant in and of itself may affect children's ability or willingness to describe events accurately. Children are more likely to refuse to identify a culprit when he is physically present than when his picture is presented in a photo lineup.[41] Research studies indicate that correct identifications occur only half as often when children face the defendant as when they do not have to face the defendant.[42] Children show noticeable signs of nervousness, fear, and anxiety when having to face the defendant. Thus children's anxiety adversely affects their per-

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[40] The behavior of the child described in *People v. Cintron*, 1990 W.L. 1337 (N.Y.), is probably not atypical of distressed child victim-witnesses:

> "It is not disputed that Jennifer [then five years old] was reluctant to testify at this hearing or that while generally responsive to questions posed to her, she gave no verbal responses, but communicated only by shaking her head. . . . Jennifer was called as a witness, but she looked at the defendant's direction and was extremely reluctant to take the stand. Without objection, the court directed that defendant be removed from the courtroom so that it could observe Jennifer outside defendant's presence. . . . [A]gain, Jennifer was generally responsive to questions, but she did not verbalize her answers. . . . After Jennifer had been on the stand for approximately two hours, the district attorney began questioning Jennifer about the details of the incident. She did not respond to these questions and remained unresponsive when asked to demonstrate what occurred using anatomically correct dolls."

In that case, even in the absence of the defendant, the child had great difficulty in verbalizing her responses, but eventually did respond verbally. *Id.* at 28.

[41] Dent, Stress as a Factor Influencing Person Recognition in Identification Parades, 30 BULL. OF THE BRITISH PSYCHOLOGICAL SOCIETY 339 (1977); D. Peters, The Effects of Event-Stress and Stress During Lineup Identification on Eyewitness Accuracy in Children, in D. Peters, Chair, Children's Eyewitness Testimony (1988) (paper presented to American Psychology-Law Society Meeting, Miami, Florida) (available from counsel upon request).

[42] Dent, *supra* n.41; Peters, *supra* n.41.

formance, with fears leading children not to reveal what they know. Moreover, the same research shows that the absence of a face-to-face encounter does not increase children's errors of identification.[43]

Even under the controlled conditions of research studies, children can be silenced by fear or apprehensiveness. For example, many children who witness or experience an event in the presence of a stranger or loved one can be easily silenced about the event when told by that person not to tell.[44] Children's main error in such circumstances is the withholding of information.

In contrast, providing a supportive atmosphere can improve children's accuracy. Young children are less suggestible in response to leading questions, including questions about abuse-related actions, when interviewed in a reinforcing and supportive manner.[45] Thus, testimony in a supportive atmosphere may decrease commission errors (false affirmations). The presence of a supportive person (a child's friend) leads to more accurate testimony.[46]

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[43] Dent, *supra* n.41; Peters, *supra* n.41.

[44] Bottoms, Goodman, Schwartz-Kenny, Sachsenmaier, & Thomas, Keeping Secret: Implications for Children's Testimony (Paper presented at American Psychology-Law Society Meetings, Williamsburg, Virginia, 1990) (available from counsel upon request); Clarke-Stewart, Thompson, & Lepore, Manipulating Children's Interpretations Through Interrogation, in G. Goodman, Chair, Do Children Provide Accurate Eyewitness Reports? Research and Social Policy Implications (Symposium Presentation at Society for Research in Child Development Meeting, Kansas City, Missouri 1989) (available from counsel upon request).

[45] Goodman, Rudy, Bottoms, & Aman, Children's Memory and Concerns: Ecological Issues in the Study of Children's Testimony, in WHAT YOUNG CHILDREN REMEMBER AND WHY (R. Fivush & J. Hudson eds. in press) (available from counsel upon request).

[46] S. Moston, The Effects of the Provision of Social Support in Child Interviews (1989) (paper presented at the British Psychological Society Meeting, York, UK) (available from counsel upon request).

One study indicated that children who testify in a simulated courtroom in front of the defendant are more likely to omit information by saying "I don't know" and are also somewhat more likely to recall less correct information than children who testify in a private room without the defendant present, as in one-way closed circuit television arrangements.[47] Testifying in court in front of the defendant results in less complete (and even somewhat less accurate) testimony compared to testimony taken in a more sheltered environment. Moreover, children who have to face the defendant and testify in court may then refuse to do so again at another time. Overall, laboratory studies indicate that the accuracy and completeness of children's testimony is adversely affected when child witnesses must confront the defendant or testify in an unsupportive atmosphere.

How does facing the defendant affect children's testimony in actual court cases? When children testify as sexual assault victims in criminal court trials, fear of the defendant is associated with children being less able to answer the prosecutor's questions and with children later believing that testifying had an adverse effect on their lives.[48] Thus, in the presence of the defendant, many children are less communicative—and less accurate—witnesses.

B. A Child Witness' Lack of Completeness in Testifying Influences Juror Perceptions of Credibility, But Does Not Necessarily Enhance The Accuracy of Juror Perceptions of Truthfulness or Lying.

Adults tend to judge child witness credibility based on several factors. When children take the stand as sexual

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[47] Hill & Hill, Videotaping Children's Testimony: An Empirical View, 85 MICH. L. REV. 809 (1987).

[48] Goodman, *supra* n.12.

assault victims, signs of distress (*e.g.*, crying, fearfulness) generally enhance their credibility.[49] Children who provide detailed, consistent, or confident testimony are also viewed as particularly credible witnesses.[50] However, studies show that confidence and detail of testimony are not particularly valid indicators of accuracy, and reliance on them may lead to error.[51]

Given that a face-to-face encounter often may limit the amount of detail a child can report, children may be viewed as less credible when they testify in court than on closed-circuit television. Under conditions of a child victim-witness' heightened emotional arousal, a guilty defendant would have the advantage of jurors' tendencies to discredit testimony due to the typical child victim-witness' uncertain manner of presentation. The imposition of emotional distress may therefore distract jurors from focusing on what may be more valid indicators of children's accuracy in testifying. Furthermore, if the child is unable to testify in a face-to-face confrontation with the defendant, the State may be deprived of testimony that could result in the conviction of a guilty defendant. Even if the child is later permitted to testify

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[49] Goodman, *supra* n.12; Melton, *supra* n.13.

[50] Goodman, Bottoms, Herscovici, & Shaver, Determinants of the Child Victim's Perceived Credibility, in PERSPECTIVES ON CHILDREN'S TESTIMONY 71 (S. Ceci, D. Ross, & M. Toglia eds. 1989); Wells & Leippe, How do Triers of Fact Infer the Accuracy of Eyewitness Identification? Using Memory for Peripheral Detail Can Be Misleading, 65 J. APPLIED PSYCHOLOGY 682 (1981); Wescott, Davies & Clifford, Lying Smiles and Other Stories: Adults' Perceptions of Children's Truthful and Deceptive Statements (paper presented at First European Congress of Psychology 1989); Nigro, Buckley, Hill & Nelson, When Juries "Hear" Children Testify: The Effects of Eyewitness Age and Speech Style on Jurors' Perceptions of Testimony, in PERSPECTIVES ON CHILDREN'S TESTIMONY 57 (S. Ceci, D. Ross & M. Toglia eds. 1989).

[51] Goodman, Bottoms, *et al.*, *supra* n.51; Wells & Leippe, *supra* n.51.

pursuant to protective measures, the traumatic experience of confrontation may continue to render him or her silent and emotionally unable to speak.

APA is unaware of completed empirical research that directly examines the effects of protective measures on jurors' abilities to detect intentional deception by children or on possible prejudicial effects of protective measures. But research on these issues is currently underway. At present, three large-scale studies are being conducted in this country, and several other studies are being carried out abroad, to evaluate the use of protective measures when children testify. Much of this research examines the emotional effects of protective measures on child sexual assault victims, in criminal court prosecutions, and the influence of such measures on jurors' decisions. Other studies are examining, in realistic mock jury research: jurors' abilities to reach the truth and to detect lying when children testify via closed-circuit television; jurors' perceptions of fairness when such procedures are employed; and the accuracy and completeness of children's reports when children are required to testify in court either facing the accused or not facing the accused, or when testifying via two- or one-way closed-circuit television. When complete, findings from such studies will aid the courts in reaching a fair balance between the need to protect child victim-witnesses from emotional distress while promoting reliable testimony, on the one hand, and the need to protect defendants' rights to confront witnesses who testify against them, on the other.

CONCLUSION

For the foregoing reasons, APA respectfully submits that the State has a compelling interest in protecting a vulnerable child victim-witness; that determinations whether that interest is implicated must be made case-by-case for each particular child; and that it is not necessary in every case to subject a young child victim-witness to the ordeal of attempting testimony face-to-face with the defendant before allowing the child to testify by means of one-way or two-way closed-circuit television. Instead of adhering to the Maryland Court of Appeals' recommendations, which would subject some vulnerable children to unnecessary emotional harm, multiple sources of information, including expert testimony, should be sought in making an individualized determination whether there is a need to limit the defendant's right to face-to-face confrontation when a particular child victim testifies. A "trial run" with attendant traumatization should not invariably be required before the court makes its individualized determination.

Respectfully submitted,

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